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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Physicians Forum respectfully moves for leave to file a brief *amicus curiae* in this case. Counsel for Appellees has consented to the filing of the brief; counsel for Appellant has declined to consent.

The Physicians Forum is a national voluntary membership organization of physicians which, in its thirty

years of existence, has concerned itself with the quality and availability of medical care in the United States. It has actively advocated programs which would deliver health care services to all people of the United States without barriers based on discriminatory policies or on the financial ability of the patient.

We believe that the case at bar is of special significance. Without doubt the outcome will directly influence the development of disability programs throughout the nation. Inasmuch as any disability program which denies compensation for pregnancy-related disabilities can lead to impairment of the health of the prospective mother and child, the health of millions of working women of this nation and their children will be affected by the decision.

We submit that the enclosed brief will be of assistance to the Court in resolving the crucial questions before it. It discusses, from a point of view different from that of the parties, the medical reasons which support the inclusion of pregnancy-related disabilities in the California disability program, and it explains why a woman unable to work because of medically certifiable conditions hazardous to her health or that of the fetus should be compensated under the program. In so doing, it seeks to demonstrate that the California statute and the policies implementing it are based upon stereotypic assumptions about pregnancy-related disabilities which do not have a basis in medical fact.

For these reasons, we respectfully request leave to file the within brief *amicus curiae*.

Respectfully submitted,

HARRY I. RAND
Attorney for Movant

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Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE PHYSICIANS FORUM AS *AMICUS CURIAE*

Interest of *Amicus*

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

Statement

The named plaintiffs in these cases are four women who must work to support themselves and their families. Each woman experienced a period of time during which she was physically unable to work because of disabilities arising out of pregnancy: in the cases of Ms. Aiello and Ms. Johnson, ectopic pregnancies; in the case of Ms. Armendariz, a miscarriage; and in the case of Ms. Jaramillo, the effects of a normal delivery of a child. The periods of disability were approximately five weeks, seven weeks, three weeks, and seven and one-half weeks, respectively. *Aiello* v. *Hansen*, 359 F. Supp. 792, 795 (N.D. Cal. 1973). During those periods, they were unable to work and did not receive the regular income from their jobs.

They looked to another source of funds to ease the financial strains caused by this loss of wages—the California disability insurance program. The broad purpose of the program is "to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." California Unemployment Insurance Code [hereinafter referred to as "U.I.C."] § 2601. The specific test for disability is set forth in the statute: "An individual shall be deemed disabled in any day in which, because of his [or her] physical or mental condition, he [or she] is unable to perform his [or her] regular or customary work." U.I.C. § 2626. Plaintiffs met this test, but they were nevertheless denied benefits under the only express statutory exclusion: "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." *Id.*

Plaintiffs commenced these actions to challenge that exclusion as discriminatory. A three-judge court, in a well-reasoned opinion, held that the challenged exclusion denied equal protection to workers who suffered pregnancy-related disabilities and enjoined its enforcement. *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973). The State of California moved for reconsideration after the statute was amended, effective January 1, 1974, but reconsideration was denied. The State of California has appealed to this Court.

ARGUMENT

I.

Whether pregnancy per se is a "disease" or "injury" is not at issue; it is a condition from which disability may and usually does arise, even when the pregnancy is "normal."

The State places great emphasis on the words "illness" and "injury," quoting those words from a 1946 gubernatorial message to the State legislature recommending establishment of a disability compensation program (Brief for Appellant at 10) and from the California statute itself (*Id.* at 8, 17-24) and takes the position that so-called "normal" pregnancy, *i.e.*, uncomplicated pregnancy, is not an "illness" or an "injury" and therefore cannot and should not be compensated under the program.

Pregnancy per se is not an injury or an illness, but that is not the question here. The issue, rather, is whether *disabilities* related to pregnancy and childbirth should be covered by the California program. Although the statute provides that the terms "disability" and "disabled" in-

clude both mental and physical illness or injury,[1] the statutory test for disability is a functional one, related to the ability to perform regular or customary work. The test accords with the purpose of the statute. (See discussion, *infra*, at pp. 9-13). There is no doubt that childbirth always causes, and that pregnancy may cause, such disability. The statute as amended covers most disabilities arising out of other than normal pregnancy and childbirth, including ectopic (tubal) pregnancy, from which two of the plaintiffs suffered, and presumably miscarriage, from which a third plaintiff suffered.[2] Therefore, the dispute here is whether disabilities arising out of normal pregnancy and childbirth constitutionally may be excluded from coverage.

The court below suggested that the State improperly relied upon stereotypes concerning pregnancy and childbirth in formulating its policy of exclusion:

> "[T]he denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will submit large disability claims. The truth of this belief is certainly suspect." (359 F. Supp. at 799)

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[1] Obviously, the legislative intent was to assure that both mental *and* physical conditions be covered.

[2] As written, the amended statute would not seem to cover disabilities arising out of most "elective" abortions, including abortions necessitated by rape, incest, financial inability to care for more children, mental or physical inability to bear or to care for more children, or malformation of the fetus. Yet, the statute was amended *after* this Court declared that a woman has a constitutional right to choose not to bear a child. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973). Such an exclusion could not be based on financial considerations, since most abortions are performed in the first trimester of pregnancy and can be done on an out-patient basis, causing less than one day of disability.

We agree. The actual length of disability varies with the age, general health, number of previous pregnancies, and type of job of the particular woman involved. Most women whose pregnancies are uncomplicated are not disabled from working until they go into labor.[3] Women physicians and nurses commonly work until the onset of labor, even though their duties are relatively strenuous compared, for example, to those of an office worker. Of course, if a woman's customary job is of a type which cannot or should not be performed by a woman in the advanced stages of pregnancy, it might be necessary for the woman to leave her job earlier.

Most women become disabled soon after labor contractions begin. These contractions, unlike other physiologic muscular contractions, are painful;[4] they continue throughout labor (which averages thirteen hours for a woman having her first child and eight and one-half hours for others)[5] and often even after delivery. Moreover, during delivery, the birth passages are lacerated,[6] and proper medical care dictates that "[t]he vulva, vagina, and uterus should be regarded as an open wound following labor and during the early days of the puerperium [period of time following labor in which the maternal organs return to their normal size and condition], and every precaution should be taken to protect the patient against infection."[7]

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[3] This is especially true concerning primagravidas (women who are giving birth for the first time). See affidavits of Drs. Goldstein and Trueblood, which appear in the Appendix submitted by the parties to this appeal [hereinafter cited as Appendix] at pp. 38-40.

[4] Eastman and Hellman, Williams Obstetrics 358 (13th ed. 1966) [hereinafter cited as Williams].

[5] Williams at 397-401.

[6] Taylor, Beck's Obstetrical Practice 572 (8th ed. 1966), Chapter 44: *Repair of Lacerations* [hereinafter cited as Beck]; Williams at 479.

[7] Beck at 214.

An episiotomy is usually performed to avoid perineal tear.[8] Blood loss results,[9] surgical repair is necessary, and the area must be allowed to heal so that accidental rupture will be prevented. Additionally, separation of the placenta from the uterine wall (the "afterbirth") creates a wound on the inner surface of the uterus,[10] which will heal normally with rest and proper care.

These conditions are merely illustrative of the many disabling physical changes which occur during normal pregnancy and childbirth.

When a woman can safely return to work after childbirth varies from one individual to another. A new mother is generally discharged from the hospital 72 hours after delivery. A short period of recuperation at home usually follows. Although the maternal organs do not *totally* heal for about six weeks (the "puerperium"),[11] most women whose jobs are not overly strenuous can probably return to work within three weeks after delivery without threatening their health.[12]

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[8] First and second degree lacerations of the perineum are extremely common during delivery, especially in primagravidas. The usual laceration is a jagged tear, which must be surgically repaired (*i.e.*, with "stitches"). For this reason, most physicians prefer to perform an episiotomy, which is a surgical procedure. "[I]t substitutes a straight, clean surgical incision for the ragged laceration that otherwise frequently results, and such an incision is easier to repair and heals better than a tear." WILLIAMS at 433.

[9] Total blood loss during and soon after the vaginal delivery of a single fetus is about 500 ml.; vaginal delivery of twins involves a loss of about 900 ml.; and delivery by cesarean section involves even greater loss of blood. WILLIAMS at 238-39. See Pritchard, *Changes in Circulation and Blood Volume During Pregnancy and Delivery*, ANESTHESIOLOGY 26: 393 (1965).

[10] 1 DAVIS, GYNECOLOGY AND OBSTETRICS 7 (rev. ed. 1972).

[11] WILLIAMS at 476.

[12] Affidavit of Dr. Calderwood, Appendix at p. 37.

What must be kept in mind is that we are concerned here only with the period in each case when a woman is medically certified as unable to work.[13]

II.

A state disability program which denies compensation for pregnancy-related disabilities is not rationally related to any legitimate state purpose and invidiously discriminates on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Whether this Court applies the "rational basis" test or the "strict scrutiny" test, it must conclude that the California statute is violative of the Equal Protection Clause.

Programs to provide compensation for wage losses during periods of disability have developed as a result of broad social welfare policies of the state and federal governments and the recognition that existing programs, i.e., unemployment, workmen's compensation and paid "sick leave" programs, do not adequately cover wages lost because of disability unrelated to employment.

The notion underlying unemployment compensation is, of course, that the worker is able to work and is available for employment which the job market is unable to supply.[14]

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[13] Although the State often refers to the disability compensation involved in this case as "maternity benefits" (Brief for Appellant at 3, 6, 7, 9, 15, 23, 35, 36), that is a misnomer. The term "maternity benefits" is commonly used to refer to *special* benefits conferred by the state or the employer regardless of the woman's physical condition, *in addition* to compensation for any loss of income due to disability. Thus, the question of maternity benefits is entirely different from the issue in this case and must be decided on the basis of social policy rather than medical considerations.

[14] *See, e.g.*, U.I.C. §§1251-1537.

The benefits are, by definition, unavailable to the disabled worker.[15] And while most states have therefore instituted workmen's compensation programs to reimburse the employee for part of the wages lost due to employment-related disabilities,[16] disabilities arising out of pregnancy are not covered by such programs either, since they are not employment-related. Many employers also permit employees to take a small number of paid "sick days" per year, in recognition of the fact that even relatively healthy people occasionally are unable to work for short periods of time from such conditions as headaches, upper respiratory tract infections, strained muscles, etc. While pregnancy-related disabilities should, of course, be covered by such programs,[17] the length of disability may exceed the number of "sick days" allowed.

Thus, some states and private employers have instituted or are instituting disability compensation programs such as the California program involved here which partially compensate a worker for loss of wages when he or she is unable to perform his or her regular or customary work because of physical or mental conditions unrelated to employment. Disabilities arising out of normal pregnancy and childbirth are precisely of the sort intended to be covered by this type of program. In the words of the court below, "the state has attempted [through the California Unemployment Insurance Code] to reduce to a minimum the

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[15] Many states, however, deny unemployment compensation to pregnant women *regardless* of ability to work. See Auchincloss, *Unemployment Benefits*, 1 WOMEN'S RIGHTS LAW REPORTER 38 (No. 4, Spring 1973).

[16] *See, e.g.*, CALIF. LABOR CODE §§3201 *et seq.*

[17] Employers have sometimes refused to treat pregnancy-related illness as other illnesses, for the purpose of "sick-days." *See, e.g., Bravo* v. *Board of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972). *See also* HAYDEN, PUNISHING PREGNANCY 37-41 (ACLU Report, Oct. 1973).

suffering caused by involuntary unemployment of every type." 359 F. Supp. at 794.

Only the Rhode Island,[18] Hawaii,[19] New Jersey,[20] and California programs, however, do not totally exclude all pregnancy-related disabilities from coverage. Rhode Island's program amounts to a program of maternity benefits.[21] Hawaii's program comes closest to a true disability program, since pregnancy is covered only when it causes disability. New Jersey's program creates a presumption that a woman is "sick" four weeks prior to and four weeks subsequent to delivery. California's newly-amended statute covers only disabilities resulting from "abnormal and involuntary complication[s]" of pregnancy, thus excluding, among others, disabilities arising out of normal pregnancy and childbirth.

In urging that pregnancy-related disabilities should, nonetheless, be excluded from the program, the State argues that pregnancy-related disabilities are significantly different from other disabilities because "[p]regnancy is, to a much greater extent than any illness or injury, voluntary and subject to planning." Brief for Appellant at 19.[22] To the extent that it is "voluntary," both a man and a woman are "voluntarily" involved in causing the pregnancy. Yet only the woman suffers financially because

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[18] R. I. GEN. LAWS ANN. §28-41-8 (1962).

[19] HAWAII REV. STAT. §392-27 (1968).

[20] N.J. STAT. ANN. §43:21-29 (1962).

[21] Thus, appellant's discussion of the Rhode Island program is inapposite. Brief for Appellant at 11, 32.

[22] To support this proposition appellant cites *Roe* v. *Wade*, 410 U.S. 113 (1973). We fail to find in that decision any language to support appellant's statement.

of her involvement.[22] In this regard, the State's argument has definite moral overtones which have no place here. Venereal disease is also a result of "voluntary" acts of sexual intercourse, but disabilities caused by V.D. would be covered by the California program. Other "voluntary" disabilities, such as those resulting from attempted suicide, cosmetic plastic surgery, dipsomania, drug addiction, obesity, and sex change operations are covered by the program, as has been pointed out by counsel for appellees and by the court below. 359 F. Supp. at 800.

Additionally, pregnancy is not always voluntary. Physicians treat many patients who have become pregnant involuntarily. Contraceptives, even "the pill," are not always effective, and for medical reasons many women cannot use the more effective types of contraceptives. To tell a woman who has become pregnant accidentally and is trying to decide between abortion and giving birth that disabilities related to both of her alternatives are not covered because pregnancy is "voluntary" is not only irrational but cruel.

Further, we disagree with appellant's assumption that "[e]ven where pregnancy is unexpected, the period of actual inability to work can be anticipated months in advance, and the attendant expenses calculated and met in other ways." Brief for Appellant at 19 n.23. The record in this case, as well as common experience, belies that assumption. For the many women who live on a bare subsistence level, loss of wages can be catastrophic. And even a middle-income worker may not be able to save enough to cover a period of wage loss if she is the sole

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[22] Only the woman is *directly* affected financially. Her family may suffer indirectly by the loss of her wages, as in the cases of three of the four named plaintiffs here.

support of her family. See, *e.g.*, "Declaration of Jacqueline Jaramillo," Appendix pp. 21-22.

Finally, if pregnancy is voluntary, it is fortunate that women "volunteer." To borrow a phrase from appellant's brief (at p. 19), "Pregnancy is a normal biological function *necessary for survival of the species.*" (emphasis added). Thus, denying disability benefits for pregnancy-related disabilities makes as much sense as denying disability benefits for injuries suffered while in the armed services of the Nation.

We will leave the sex discrimination arguments primarily to the Appellees. We must, however, note that no one could deny that a statute invidiously discriminated on the basis of race if it provided compensation for all disabilities except those arising out of sickle-cell anemia. That condition affects only Negroes and persons stemming from certain Mediterranean areas. Likewise, no one could deny that a statute invidiously discriminated on the basis of sex if it provided compensation for all disabilities except those arising out of hemophilia, a disease which is disabling only to males (although females can be "carriers"). Similarly, no one can deny that a statute invidiously discriminates on the basis of sex when it grants compensation for all disabilities except those arising out of pregnancy. No authorities need be cited for the proposition that that condition affects only women.

III.

To deny compensation for pregnancy-related disabilities contributes to poor maternal and infant health.

The Physicians Forum is particularly concerned with the practical effect of California's policies on the health of the woman and the child, both before and after birth. Most women who work do so because of financial necessity. Many are heads of households. Others must work because their husband's incomes are insufficient to maintain their families above poverty level. What happens when a woman such as this becomes pregnant?[24]

To begin with, the health risks attendant to pregnancy and childbirth are higher for women and children from low-income families than for those from more affluent families. The woman's general health tends to be poorer, due to nutritional deficiencies and other factors; she makes fewer pre-natal visits to a doctor or a clinic; the hospital in which she delivers her child and the medical care she and the child receive tend to be of generally lower quality.[25]

In a high-risk situation like this, the dangers may increase further if the woman knows she will receive no compensation for any time she cannot work because of pregnancy-related disabilities. She may ignore important warning signs that complications are developing. She may work at a strenuous job well past the time when it is safe for her to do so. After childbirth, she may go back

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[24] We will assume that she has chosen to continue the pregnancy to term.

[25] *See generally, A Study of Risks, Medical Care and Infant Mortality*, 63 Am. J. Pub. Health (Sept. 1973 Suppl.)

to work before it is medically advisable. Injuries to her health and to the health of her child may follow.

In short, a statutory provision such as that involved here may force a woman to work out of economic necessity even though her doctor advises her of the medical risks involved.

IV.

There is no evidence that the program would be abused if pregnancy-related claims were allowed; in any event, any possible abuse could be curbed by applying the same standards to pregnancy-related claims as to other claims.

The State has tried to paint frightening pictures of women conspiring with their doctors to collect benefits under the disability program when they are not truly disabled (see, in the court below, 359 F. Supp. at 806, and before this Court, Brief for Appellant at 20).

The State admits that disabilities arising out of pregnancy and childbirth (or at least the latter) are medically certifiable, in that "it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth. ..." Brief for Appellant at 20.

Yet, according to the State, claims have averaged fifteen weeks. *Id.* We are not told whether these claims are for disabilities arising only out of normal pregnancy and childbirth. At any rate, we do not understand it to be the usual procedure automatically to pay the amount claimed. As appellees have noted (Motion to Affirm at 4 n.3):

> "Various statutory and administrative rules ensure that only those who are truly incapacitated from per-

forming their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemp. Ins. Code §§2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemp. Ins. Code §2627(c). Appellant also maintains 'yardstick' standards measuring the likely time duration of various types of disabilities, and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability."

These same rules which are adequate to test all other types of disabilities will be adequate to test pregnancy-related disabilities as well, once the system becomes accustomed to handling these claims and once the public has been informed of the limits of the program. Many individuals, including physicians, may be acting under the misimpression that California has instituted a program of "maternity benefits." After all, the State itself has so mislabeled it. Once it has been explained to claimants and physicians that payments may be forthcoming only for days when a woman is actually disabled from working, claims will reach a reasonable level. Once the State develops a "yardstick" standard for disabilities related to pregnancy and childbirth, as it has for all other disabilities,[24] it will be able more efficiently to process those claims.

The State also fears that "maternity leaves will be requested based on concern for the welfare of the child...." Brief for Appellant at 20. As we have already noted, how-

[24] We do not agree that it will be difficult to develop a "yardstick" standard for disabilities related to pregnancy and childbirth. See Brief for Appellant at 32. Just because a "yardstick" does not now exist does not mean one cannot be developed.

ever,[17] what is at issue here is not "maternity leaves" but disability compensation. Additionally, the State has failed to distinguish between the pre-partum period, when the fetus is biologically dependent on the woman, and the post-partum period, when the child may be tended by any caretaker, not necessarily the mother. There will undoubtedly be isolated cases where concern for the health of the fetus will necessitate a cessation of the woman's employment prior to the expected delivery date.[18] We cannot believe that the State would raise any serious objections to this. However, after birth, when the mother and child are separate beings, the medical question of a mother's ability to work is totally separate from the question of who will take care of the child. It is not within the physician's sphere to certify that a woman is *medically* disabled from working when her reason for not working is that she wishes to stay home to care for the child, that she wishes to breast-feed the child, or that she is unable to engage someone to care for the child while she is at work, whether for financial or other reasons.[19] Finding solutions to these problems is up to the individual, the state legislatures and Congress.

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[17] See note 13, *supra*.

[18] The State cites only one example of such a case. Brief for Appellant at 20 n.25.

[19] Therefore, the State's citations to the work by S. Cherry and to the affidavit of Dr. Goldstein are inapposite. Brief for Appellant at 20 n.25.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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